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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,

Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

Utah Lake is a navigable body of water whose bed Utah claims under the Equal Footing Doctrine. The United States claims the lakebed because the United States Geological Survey made a pre-statehood withdrawal of the lake as a reservoir site. The purported authority for the withdrawal was the Sundry Appropriations Act of 1888, which did not specify the reservoir sites to be withdrawn and did not refer to sovereign lands.

The questions presented are:

1. Whether the provisions of the 1888 Act defeat Utah's entitlement to the bed of Utah Lake under the Equal Footing Doctrine.

2. Whether the administrative withdrawal was statutorily authorized and, if so, whether the withdrawal is sufficient to defeat Utah's sovereign ownership.

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UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The State of Utah, by and through its Division of State Lands, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 780 F.2d 1515 (Appendix A, App. 1a). The opinion of the United States

District Court for the Central Division of Utah (Jenkins, D.J.) is reported at 624 F.Supp. 622 (Appendix B, App. 28a).

JURISDICTION

The Tenth Circuit on December 26, 1985, entered a judgment and an opinion affirming the District Court's summary judgment quieting title to the bed of Utah Lake in the United States. App. 27a. No petition for rehearing was sought. On March 12, 1986, Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including April 25, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Sundry Appropriations Act of 1888, 25 Stat. 505, 526-27, is reproduced in relevant part at page 10. That Act was partially repealed or amended in 1890 (26 Stat. 391), in 1891 (26 Stat. 1101), and in 1897 (29 Stat. 599) (these are reproduced in Appendix C).

STATEMENT OF THE CASE

The original thirteen States created a constitutional union based on the States' sovereign equality. Among each State's sovereign rights is ownership of all lands beneath its navigable waters (sovereign lands). Since 1845, in *Pollard's Lessee v. Hagan*, 3 How. (44 U.S.) 212, this Court has applied principles known as the Equal Footing Doctrine. Thereunder, by operation of constitutional law each State, at statehood, takes title to its sovereign lands. Until statehood, those sovereign lands

are held in trust by the federal government for the future State. The State's title to sovereign lands can be defeated or diminished only by a pre-statehood act of Congress clearly conveying that land to meet some international duty or public exigency.

Prior to the Sundry Appropriations Act of 1888, 25 Stat. 505, 526-27, there was a widespread problem on public-domain lands. Land speculators, called "land-grabbers," were monopolizing some of the West's most valuable lands by preempting reservoir sites and other lands having particular irrigability or access to irrigation water. The speculators, acting as individuals, syndicates and corporations, seized these desirable lands for profit.[1]

Congress countered the problem with the relevant part of the 1888 Act, which authorized the United States Geological Survey ("USGS") to select and withdraw lands suitable for irrigation or reservoir sites. Those lands would then be preserved for future disposition, and would be safe from the speculators. The withdrawn lands were reserved from sale as property of the United States, were not subject to sale, entry, settlement or occupation, and could be homesteaded only by presidential proclamation. The Act did not refer to sovereign lands.

Utah Lake, a navigable body of water covering approximately 150 square miles and Utah's largest fresh-

[1] That this problem was the reason for the 1888 Act is shown in its legislative history, 19 Cong. Rec. 7012-7032, 8471, 8505-8513, and Appendix 496-498 (1888), and in the legislative history of amending legislation, e.g., 21 Cong. Rec. 7277, 7287, 7359, 7394, 7399 7771, 7981 and 9155 (1890), and Senate Report No. 928, pp. 169-70 (1890).

water lake, soon became entangled in USGS's withdrawal pursuits. In 1889, USGS purported to withdraw the bed of Utah Lake as a reservoir site together with all land within two statute miles of the lake's border. 780 F.2d at 1519 (App. 10a). The United States, however, never utilized the lake as a reservoir site.

On January 4, 1896, Utah obtained statehood, at which time, under traditional principles of constitutional Equal Footing, the State gained title to the beds of its navigable bodies of water. Thereafter, Utah exercised its ownership of the bed of Utah Lake through use, management, control,[2] and judicial declaration.[3]

In 1976, the Bureau of Land Management issued oil and gas leases on the lakebed, which Utah viewed as a violation of its sovereign rights. 780 F.2d at 1516 (App. 2a). Following unsuccessful negotiations, in May 1979 Utah filed this action in the district court, for declaratory judgment (that the 1889 withdrawal of Utah Lake did not deprive Utah of its title to the lakebed), to quiet title, and for confirmation of the State's title under the Submerged Lands Act, 43 U.S.C. 1311. Jurisdiction was asserted under 28 U.S.C. Sections 1331, 2201 and 2409a. In a memorandum opinion and order, App. 28a, the district court granted Respondents' motion for summary judgment and quieted title to the lakebed in the United States.

The Tenth Circuit affirmed, concluding that (1) since the 1888 Act did not expressly restrict the type of

[2] R. Vol. IV, Tabs A-K.

[3] See the Utah Supreme Court citations in note 4.

land USGS could select for reservoir sites, USGS was free to withdraw beds of navigable waters—including the bed of Utah Lake; (2) USGS withdrew the bed of Utah Lake in 1889, defeating Utah's title under the Equal Footing Doctrine; and (3) the Submerged Lands Act did not confirm title in Utah.

REASONS FOR GRANTING THE WRIT

The Equal Footing Doctrine is an important and fundamental constitutional guarantee of equality in State sovereign rights. Its basic principles have not changed since its first application by this Court over 140 years ago.

Unfortunately, those long-established principles do not prevail in the decision below. Instead, the lower court introduces severe changes that do grave damage to the Doctrine. By those changes Utah's sovereign title was denied; and by its nature the lower court's decision against State sovereignty is likely to affect many interests beyond those presented here.

The decision below clearly conflicts with decisions and settled principles of this Court, as reaffirmed in *Montana v. United States*, 450 U.S. 544 (1981), in that the lower court: (a) changes the established constitutional standard for determining whether sovereign title can be denied; (b) reverses the presumption this Court has established in favor of State sovereign title; (c) essentially eviscerates the United States' trust obligations regarding sovereign lands; (d) far exceeds the reach of this Court's holdings by denying the State's title on the basis of the

administrative withdrawal; (e) demotes sovereign lands to the status of public-domain lands; and (f) seeks to support its erroneous conclusions upon a statutory construction that is unsound for many reasons, including its inconsistency with this Court's precedents.

Of course, the State of Utah is most directly aggrieved by the lower court's abrupt modification of the law. Utah Lake is Utah's largest freshwater lake and an important natural resource whose ownership and control are of great consequence to the State. And the Utah Supreme Court has long recognized the State's ownership of the lakebed.[4]

But the harm of the decision below is not confined to Utah Lake. Public-lands States are encumbered with various kinds of federal administrative withdrawals; and the lower court's decision simply invites conflict and creates problems for those States and other circuits wherever such withdrawals involve sovereign lands.

The Tenth Circuit, which encompasses many of the States likely to generate these issues again, has signaled a substantial change in the standards and rules governing Equal Footing and sovereign lands. This is a significant case involving important constitutional issues that need this Court's review.

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[4] State v. Rolio, 71 Utah 91, 262 Pac. 987 (1927); and Provo City v. Jacobsen, 111 Utah 39, 176 P.2d 130 (1947), on rhg. 111 Utah 68, 181 P.2d 213 (1947), and on second appeal after remand, 117 Utah 507, 217 P.2d 577 (1950). These cases, however, did not have the United States as a party and did not address the issues presented here.

I. THE LOWER COURT HAS DEPRIVED UTAH OF ITS SOVEREIGN TITLE IN UTAH LAKE BY APPLYING A STANDARD IN CLEAR CONFLICT WITH THE CONSTITUTIONAL STANDARD ESTABLISHED BY THIS COURT, BY REVERSING THE ESTABLISHED PRESUMPTION, BY EVISCERATING THE FEDERAL TRUST OBLIGATION, AND BY DEMOTING SOVEREIGN LANDS TO THE STATUS OF PUBLIC LANDS.

A. *The Constitutional Requirements*

The Equal Footing Doctrine holds that all States admitted to the Union possess the same rights and sovereignty as the original 13 States. *Smith v. Maryland,* 18 How. 71 (1855); *Utah v. United States,* 403 U.S. 9 (1971); *California, ex rel. State Lands Comm'n v. United States,* 457 U.S. 273, 281 n.9 (1982). The original States reserved the right to the beds of navigable waters and new States have the same right. *Pollard's Lessee v. Hagan,* 3 How. (44 U.S.) 212, 229, 230 (1845). A "State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself." *Oregon v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 374 (1977). As a result, the federal government holds sovereign lands (beds of navigable waters) in trust for future States. *Pollard's Lessee, supra,* at 222-23, 229; *Borax, Ltd. v. Los Angeles,* 296 U.S. 10, 15 (1935).

As in any trust relationship, the United States, as trustee, is very restricted in what it may do with the trust property. In *Montana v. United States,* 450 U.S. 544

(1981), this Court reconfirmed that the federal government may dispose of a State's sovereign lands before statehood only for "some international duty or public exigency." *Id.* at 552.

Such a conveyance must not be lightly inferred. In fact, there is a *"strong presumption"* against such conveyances. *Id.* (emphasis added). Congress's intention to make the conveyance must be "definitely declared or otherwise made [very] plain," "in clear and especial words," or the valid muniment of title must "in terms embrace[] the land under the waters of the stream." *Id.* quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926); *Martin v. Waddell*, 16 Pet. (41 U.S.) 367, 411 (1842); and *Packer v. Bird*, 137 U.S. 661, 672 (1891). The Constitution erects such a high standard for deprivation of State title "because control over the property underlying navigable waters is so strongly identified with the sovereign power of government." *Id.*, citing *United States v. Oregon*, 295 U.S. 1, 14 (1935).

The constitutional standard requires proof of a "public exigency." A "public purpose," even an entirely "appropriate" one, is not sufficient. *Montana*, 450 U.S. at 556.

In *Montana*, the United States, acting for the Crow Tribe, sued the State to quiet title to the bed of a navigable river. The question was whether the United States conveyed beneficial ownership of the riverbed to the tribe by virtue of two Indian treaties, or whether the United States had retained ownership of the riverbed, which then

passed to the State at statehood. In construing the treaties the Court determined that their provisions for Indian property rights were "not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed." *Id.* at 554. The treaties did not expressly refer to the riverbed, *id.*, there was no international duty or public exigency, *id.* at 556, and Montana was held to own the riverbed.

The State won despite "the unique legal status of Indian tribes under federal law" that gives Congress a "unique obligation toward the Indians," which often has been the basis for valid legislation giving Indians "special treatment," *Morton v. Mancari*, 417 U.S. 535, 551, 555 (1974); and despite this Court's practice of resolving doubts in Indian treaties in favor of the Indians. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). *Montana* shows the invariable applicability of the "strong presumption" against federal conveyance of a State's sovereign entitlement. And it speaks a fortiori in favor of Utah's position here, because in this case the United States has no special responsibility, like the Indian trust-relationship, that could be claimed to override its constitutional obligation to hold sovereign lands in trust for the State.

B. *The 1888 Act*

The Sundry Appropriations Act of 1888 ("Act") was heavily relied on by the lower court. To demonstrate how the constitutional standard applies in this case, we quote the relevant part of the Act:

> For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, and to make the necessary maps, including the pay of employees in field and in office, the cost of all instruments, apparatus, and materials, and all other necessary expenses connected therewith, the work to be performed by the Geological Survey, under the direction of the Secretary of the Interior, [there is appropriated] the sum of one hundred thousand dollars or so much thereof as may be necessary. . . . *And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches, or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement, or occupation until further provided by law*: *Provided,* That the President may at any time in his discretion by proclamation open any portion or all of the lands reserved by this provision to settlement under the homestead laws.

25 Stat. at 526-527 (emphasis added).

The Act speaks for itself. Or perhaps more aptly, the Act is dispositively silent. The Constitution sustains State sovereign title unless the subject legislation (a) clearly, definitely and specifically expresses (b) the need for sovereign lands (c) to meet some international duty

or public exigency.[5] Nothing in the Act meets that test. Nothing here counteracts the "strong presumption" of State title.[6]

A principal reason this Court upheld the State's title in *Montana* was the fact that the Indian treaties made no reference to sovereign lands. 450 U.S. at 554. The same is true in Utah's case; the 1888 Act also does not include sovereign lands. But unfortunately (as we discuss hereafter), the Tenth Circuit failed to follow *Montana*. Instead, the lower court gave directly opposite effect to the fact this Court relied on; it deprived Utah of title *because* the Act did not refer to sovereign lands. 780 F.2d at 1521 (App. 15a). That illustrates the Tenth Circuit's reverse presumption.

Montana emphasizes the requirement of clarity and definiteness. Since the *Montana* treaties were held to lack the specificity and clarity necessary to include sovereign lands, the same must hold a fortiori in Utah's case because the 1888 Act contains even less basis for inferring a reference to sovereign lands. By comparison, the treaties were models of clarity and site-specificity.

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[5] Hereinafter, since the Act unquestionably is not tied to any international duty, we discuss this branch of the constitutional standard by referring only to "public exigency."

[6] Construction of the Act in favor of State title is further indicated in that by 1888 Congress was aware of the federal government's trust obligations toward the future States' sovereign lands, and of the substance of the presumption in favor of State title. **Montana,** 450 U.S. at 552 n.2; Martin v. Waddell, 16 Pet. 367 (1842); Pollard's Lessee v. Hagan 3 How. 212 (1845); and Smith v. Maryland, 18 How. 71 (1855). If Congress actually had intended to override traditional State ownership of Utah Lake and other sovereign lands, it would have been much clearer about it.

For example, the treaties created a special reservation, specifically detailed its land and boundaries, and stated that such land would be "set apart for the absolute and undisturbed use and occupation of the Indians . . . ." *Montana*, 450 U.S. at 553. In Utah's case, the 1888 Act was less specific. It contemplated no particular land, and referred only broadly to "the arid region of the United States."

The treaty provided that the United States "solemnly agrees" that no one but designated government agents "shall ever be permitted to pass over, settle upon, or reside in" the reservation. *Id.* at 553-54. Without similar specificity in referring to affected lands, the 1888 Act provided that selected lands would be "reserved from sale" and "not be subject . . . to entry, settlement, or occupation . . . ."

Like the treaties, the 1888 Act contains no language construable as an inclusion of sovereign lands, and "is not strong [nor clear, nor specific] enough to overcome the presumption against" any pre-statehood conveyance of the lakebed. *Id.* at 554.

It is already clear that the 1888 Act does not overcome *Montana*'s strong presumption for State title, but there is additional affirmative support for the State's position, which we briefly discuss.

The Act shows that Congress never intended it to interfere with State sovereign lands. The public domain and sovereign lands are entirely distinct, the latter not being subject to public selection, settlement or entry, etc.,

under the public-land laws.[7] The Act consists of public-land-law terms, and its silence on sovereign lands comports with Congress's purpose of remedying a problem that affected only public-domain lands.

Valuable irrigable public lands and reservoir sites were being monopolized by speculators. The "land-grabbers" were using the land laws to take control of the most useful lands by sending "their agents in after the surveyor and . . . seizing upon the lands wherever the source of water supply for irrigation was found." 21 Congressional Record 7394 (1890) (remarks of Sen. Reagan).[8] Thus they were excluding others from using these public lands—and it was happening on an alarming scale.

The 1888 Act was the intended remedy. It authorized USGS to make appropriate withdrawals, which

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[7] The Act provides that all lands USGS was authorized to select for reservoir or irrigation purposes were "reserved from sale as the property of the United States, and shall not be subject . . . to entry, settlement or occupation," and were open to homesteading only by presidential proclamation.

Several cases show that " 'public domain' is equivalent to 'public lands,' and these words have acquired a settled meaning. . . ." Barker v. Harvey, 181 U.S. 481, 490 (1901). "Public lands" are those "subject to sale or other disposal under general laws." Id., quoting Newhall v. Sanger, 92 U.S. 761, 763 (1875). "Specifically, the term 'public lands' [does] not include tidelands." Borax, Ltd. v. Los Angeles, 296 U.S. 10, 17 (1935), citing Mann v. Tacoma Land Co., 153 U.S. 273, 284 (1894). The State's title in sovereign (submerged) lands "is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale." Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892).

[8] Senator Reagan, the author of the 1888 Act, gave this explanation of the Act's purpose during debate over 1890 legislation that was passed to repeal the 1888 Act. That was only one of many similar expressions in Congress. The repeal was necessary because of USGS's overzealousness.

would stop the speculation and monopolization and preserve those lands for future disposition. The Act was silent about sovereign lands, and naturally so, since they were not associated with the problem the Act was addressing. Sovereign lands were not affected by the "land-grabbing," which was being done on public lands under the public-land laws.

The 1888 Act countered the land-grabbing, but soon became the unanticipated basis for another problem. USGS, apparently striving to do all it could with the authority it presumed to have under the Act, soon had withdrawn great amounts of land. Now the public outcry was that USGS, rather than private land-grabbers, was thwarting settlement. *E.g.*, 21 Cong. Rec. 9155 (1890).

In 1890, Congress reacted to those administrative excesses by repealing the 1888 Act and curtailing USGS's activity. The 1890 act[9] and later legislation[10] confirmed that the 1888 Act had authorized the withdrawal of only

[9] The 1890 legislation, 26 Stat. at 391, provided that "so much of [the 1888 Act] as provides for the withdrawal of the public lands from entry, occupation, and settlement, is hereby repealed . . . ." See also next note.

[10] Further legislation, in 1891, 26 Stat. 1101, supports the 1888 Act's unmistakable pertinence only to public lands. The 1890 act had provided that "reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided for by said [1888] act . . . ." Id. at 391. The 1891 act corrected another aspect of USGS's earlier excesses by providing that the reservoir sites were restricted to "only so much land as is actually necessary for the construction and maintenance of reservoirs . . . ." Each of the 1890 and 1891 acts was tied explicitly to the terms of the 1888 Act, and did not purport to expand any authority under that Act. The 1897 legislation relating to the use of reservoir sites, 29 Stat. 599, referred to the 1891 act. None of the acts professed, in clear and define terms or otherwise, to authorize or support the withdrawal of sovereign lands.

"public lands." Congress had never conceived that sovereign lands would be affected, and clearly did not authorize USGS to withdraw the bed of Utah Lake. The lower court's contrary inferences oppose the analytical prescriptions of *Montana*.

Of course, even if there had been some purported inclusion of sovereign lands, the State's entitlement would yet be safe unless, in addition, it could be demonstrated that the Act clearly and properly included the particular sovereign land to meet some public exigency. Utah Lake is not so affected here.

Having examined the constitutional standards as applied in *Montana* and to the 1888 Act, we next turn to the lower court's misapplication thereof.

C. *The Decision Below*

The Tenth Circuit's decision, contrary to the principles of the venerable line of cases this Court recently reaffirmed in *Montana*, denied the State's title despite the Act's lack of clear reference to sovereign lands and public exigency. The lower court acknowledged this Court's standard (780 F.2d at 1518-19; App. 6-9a), but immediately abandoned it for a substantially lesser one.

With respect to public exigency, the court was "satisfied that the withdrawal of Utah Lake, including its bed, was made for a *public purpose motivated* by a public exigency. . . ." 780 F.2d at 1524 (App. 23a) (emphasis added). The lower court located a "public purpose" in the 1888 Act's facilitation of irrigation. *Id.* But

such a public purpose is immaterial in this context. Since the Act presents no "public exigency," there is no constitutional basis for overriding the Equal Footing Doctrine. *Montana*, 450 U.S. at 556.

"A public purpose motivated by a public exigency" is a substantial dilution of the true standard, and indicates that the lower court will deny sovereign title upon tentative, tenuous, and indirect bases. That is what happened below. It does not follow that the State's title should be (or was intended to be) denied simply because Congress wanted to facilitate irrigation. Regardless of who owned the lakebed, it would be covered with water; and State ownership of the lakebed would not change the water's availability for irrigation.[11] The United States clearly did not need the lakebed to meet Congress's concern. Since it has no basis in a "public exigency," the decision below must be corrected.

We must also briefly discuss how the lower court violated the constitutional standard and presumption by not requiring a clear and definite legislative reference to sovereign lands. Because the *Montana* treaties lacked such expression, the State prevailed. The 1888 Act also lacks any such expression; but the lower court, failing to follow *Montana*, embarked on its own approach; one that reverses the established presumption.

Rather than presuming State ownership, the lower court proceeded from the opposite premise that since

[11] Irrigation from Utah Lake certainly has proceeded orderly and fairly under Utah water law, and has done so irrespective of considerations of lakebed ownership.

sovereign lands were not expressly *excluded* (because the Act is silent about them), the State could not own the lakebed. 780 F.2d at 1521 (App. 15a). The Tenth Circuit, unwittingly or not, has imposed a reverse presumption.

The ramifications of the lower court's mistake are dramatic. Of course, the reversed presumption is itself extremely significant, and calls for immediate correction. But in addition, the decision below effectively wipes out the distinction between sovereign lands and public-domain lands, a distinction maintained by the Constitution under the Equal Footing Doctrine.

As shown above, the Act did not refer to sovereign lands; it pertained only to public-domain lands. (*See ante* note 7.) By holding that the Act applied also to sovereign lands, the lower court treats both classes of land absolutely alike. This disparagement would remove sovereign lands from trust and place them in the realm of public lands, to become open to general entry and use. It would greatly demote Utah in relation to its sister States, deprive it of its constitutional due, and deny it the benefits of owning and controlling the natural resources of Utah Lake. These problems are not merely theoretical, as is evidenced by BLM's 1976 issuance of leases on the lakebed.

The decision below abandons the established "strong presumption" and this Court's "clarity and definiteness" standard, and relies instead on baseless implication.[12]

[12] Montana does not allow deprivation of sovereign title by implication, but only by express reference. United States v. Aranson, 696 F.2d 654, 664 (9th Cir. 1983).

The flaw in the lower court's approach is apparent. Clear, definite legislation should not need interpretation by implication; and legislation unclear or indefinite with respect to sovereign lands cannot defeat State title. *Montana,* 450 U.S at 554. Since sovereign lands are not clearly and specifically referred to by the 1888 Act, it (and a fortiori any implication derived from it) lacks the force and focus necessary to invade the aegis of constitutional Equal Footing.[13]

The Tenth Circuit's decision is contrary to *Montana,* applies a new standard, and violates Utah's Equal Footing entitlement.

II. THE DECISION BELOW RAISES FUNDAMENTAL AND UNRESOLVED QUESTIONS BY DENYING UTAH'S TITLE ON THE BASIS OF THE 1889 ADMINISTRATIVE WITHDRAWAL.

We showed above that the 1888 Act did not authorize deprivation of State sovereign lands. That being true, the lakebed's 1889 administrative withdrawal, depending as it must on the Act for its authority, perforce

[13] The tenuity of the decision below is reflected further in its reliance on "documents compris[ing] [USGS's] contemporaneous interpretation and understanding of the scope" of that agency's own action. The court concluded therefrom that USGS actually intended to withdraw the bed of Utah Lake. 780 F.2d at 1520 (App. 13a). We need not debate USGS's intentions, for they are irrelevant if the agency had no authority. Congress's intent in the 1888 Act is at issue here. The cases the lower court cites (**Choctaw Nation** and **Udall**) do not require deference to an agency's understanding of its own actions where those actions are taken without statutory authority. Since the treaties were insufficient to overcome State title in **Montana**, clearly the administrative documents in this case cannot suffice.

could not have defeated the State's title. The lower court's contrary conclusion raises additional disquieting questions that need this Court's attention.

To our knowledge, this Court has never allowed a State's Equal Footing entitlement to be denied except upon a final conveyance of federal title, and indeed a conveyance authorized by Congress and proved under the constitutional standard.[14] The reservoir site withdrawal is not enough.[15]

This is an important issue. Federal withdrawals and reservations are common and widespread throughout the West, and do affect sovereign lands, as is evidenced by the instant case and others.[16] States need to know

[14] By this we mean to include also any situation where the United States had no title to which the State could succeed. **E.g.**, Knight v. United Land Ass'n., 142 U.S. 161 (1891) (title under Mexican grants pre-dating territorial acquisition by the United States remains secure as against the state and federal governments). The cases are few and easily distinguishable in which this Court has found that the constitutional standard has been satisfied for a denial of State title. But to our knowledge, all of those cases, too, involved title conveyances. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) (The United States **conveyed fee title** to the tribe. As **Montana** discusss (at 555 n.5), that the Choctaw Nation prevailed against the State's title "is a singular exception" to established law, and was "based on very peculiar circumstances not present in this case."); **Knight, supra.**

[15] Even **assuming** that the withdrawal was authorized and valid, it did nothing more than reserve a reservoir site. That is not inconsistent with State title in the lakebed, including ownership of the mineral estate, etc. The administrative withdrawal is not tantamount to a conveyance of the United States' title.

[16] It is one of many issues in **United States v. State of Alaska** (No. 84, Original), presently pending in this Court before a special master.

whether the Constitution permits the defeat of sovereign State title by mere administrative withdrawal.

It is, after all, *Congress's* pre-statehood intention to *convey* sovereign lands that, if definitely expressed and for a public exigency, will defeat a State's title.[17] "A [federal] reservation . . . cannot operate to escalate the underlying claim of the United States to the land in question." *United States v. California*, 436 U.S. 32, 41 (1978).[18] That is appropriate. Nothing but compelling needs giving rise to definitely-expressed final conveyances (by which the federal government's title is clearly extinguished, leaving nothing for the State to succeed to) should ever be the basis for denying a State's Equal Footing entitlement.

The 1888 Act lacked expression of any intention to convey sovereign lands, and "no unexpressed and unsuggested intention should be attributed to Congress—certainly no intention to make the people of the State . . ., who otherwise would receive these [sovereign] lands for their general benefit, suffer . . . ." *Mann v. Tacoma Land Co.*, 153 U.S. 273, 285, 286 (1894). Yet, the decision below went beyond the Act, even beyond the 1889 withdrawal, to examine "other [later] agency documents surrounding the withdrawal." 780 F.2d at 1519 (App. 11a). The inferences the lower court sought in that collage of administrative papers certainly do not satisfy the requirements for defeating Utah's title.

[17] As stated in **Montana**, "Congress may sometimes convey lands below . . . a navigable water," provided the requisite tests are met. 450 U.S. at 551 (emphasis added).

[18] In **California**, the Court upheld the State's title to the submerged lands within the Channel Islands National Monument, situated within the three-mile marginal sea. The sentence quoted in the text referred to a national monument reservation, which was held to be no basis for federal title under the Submerged Lands Act, 43 U.S.C. 1313(a). It involved a post-statehood reservation of lands that before the Submerged Lands Act were clearly federal. 436 U.S. at 33-34 and n.3.

Because "Congress had made no provision for" withdrawals of sovereign lands, USGS's intentions and actions, "no matter with what seeming regularity the forms of law may have been observed," do not validate the 1889 withdrawal of Utah Lake. *Borax, supra*, at 18, quoting from *Smelting Co. v. Kemp*, 104 U.S. 636, 641 (1881). USGS was simply without jurisdiction or competency to defeat sovereign title. *Id.*

The decision below stands in stark contrast to the standards, presumption and analysis this Court has demanded of any attempt to override a State's sovereign entitlement. By denying State title on such attenuated grounds, the lower court has reached around the "strong presumption" and plowed inroads into constitutional Equal Footing.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APRIL 25, 1986

APPENDIX A

The STATE OF UTAH, By and Through its DIVISION OF STATE LANDS, Plaintiff-Appellant,

v.

UNITED STATES of America; William P. Clark, Secretary of the Department of the Interior; Robert F. Burford, Director of the Bureau of Land Management within the Department of the Interior; and Roland G. Robison, Jr., Utah State Director of the Bureau of Land Management; Defendants-Appellees.

No. 83-1731.

United States Court of Appeals,
Tenth Circuit.

Dec. 26, 1985.

Dallin W. Jensen, Sol. Gen. of the State of Utah (David L. Wilkinson, Atty. Gen. of the State of Utah, Michael M. Quealy and R. Douglas Credille, Asst. Attys. Gen., Salt Lake City, Utah, were also on the brief), for plaintiff-appellant.

Lois J. Schiffer, Atty., Dept. of Justice (F. Henry Habicht, II, Asst. Atty. Gen., Washington, D.C., Brent D. Ward, U.S. Atty., Salt Lake City, Utah, Dirk D. Snel, Steven A. Herman, and Lawrence W. Puckett, Attys., Dept. of Justice, Washington, D.C., were also on the brief), for defendants-appellees.

Before HOLLOWAY, Chief Judge, and DOYLE and LOGAN, Circuit Judges.

HOLLOWAY, Chief Judge.

The State of Utah timely appeals from a summary judgment quieting title in the United States to the bed of Utah Lake, located in Utah County, Utah. Judgment was entered on the theory that the United States withdrew the lakebed as part of an 1889 reservoir site selection, and that title did not pass to the State of Utah under the equal footing doctrine when Utah became a State in 1896, and that title to the lakebed did not pass to the State under the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1343. — F.Supp. — (D.Utah 1985).

We affirm.

I

The factual background

As noted in Utah's brief, the controversy that gave rise to this litigation occurred in the autumn of 1976 when the Bureau of Land Management of the Department of the Interior began to issue oil and gas leases on the bed of Utah Lake[1]—an act that the State viewed as a violation of its ownership and property rights to the bed of Utah Lake. Appellant's Brief 2; *see also* I R. 39, 48. Following unsuccessful efforts to resolve the conflicting claims, the State initiated this action to quiet title.

[1] For a general description of Utah Lake, see **Utah v. Marsh, 740 F.2d 799, 800-01 (10th Cir. 1984)**.

In its complaint the State claimed that on January 4, 1896, by virtue of the State's admission into the Union on an equal footing with all other states, the State of Utah became the owner, and has ever since been the owner, of the bed of Utah Lake, a navigable body of water located wholly within the State. I R. 1-2. Utah Lake is the largest freshwater lake in the State, with a surface area of approximately 150 square miles. *Marsh*, 740 F.2d at 800.

By way of an amended complaint, the State alternatively claimed that if for any reason it did not obtain title to the bed of Utah Lake at the date of statehood, it obtained full title thereto, including all natural resources in the bed and waters of such lake, on or about May 22, 1953, by virtue of the Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.*, and particularly § 1311(a). I R. 40. The State requested the court to adjudicate and declare the State of Utah to be the owner of the bed of Utah Lake and the natural resources associated therewith and also requested that the court enjoin defendants from interfering with Utah's ownership and managment. I R. 2-3, 40.

By way of answer, defendants denied all of Utah's ownership claims to the bed of Utah Lake. I R. 10-11, 47-48. Defendants asserted that title to the bed of the lake had remained in federal ownership by virtue of a reservoir site selection on April 6, 1889, by then Director of the United States Geological Survey, J. W. Powell, and that the State received no title to the lands in question by virtue of the Submerged Lands Act. I R. 97-98. Defendants further claimed, as a procedural and jurisdic-

tional matter, that any legal challenge regarding the effect of the 1889 withdrawal on the title to the bed of Utah Lake had to be brought under the Quiet Title Act, 28 U.S.C. § 2409a, by the party disputing the title of United States, and that any action brought under the Quiet Title Act by plaintiff was barred by the statute's 12-year limitation period in §2409a(f). I R. 97.

Cross-motions for summary judgment were filed. After a hearing, the district court issued its Memorandum Opinion and Order observing as an initial matter that the parties were in dispute regarding the procedure by which the case had come before the court, with plaintiff insisting that the suit was one for a declaratory judgment and defendants maintaining that it was a quiet title action; however, the court declined to resolve this jurisdictional dispute, ruling that either theory gave it the opportunity to examine the merits of the case.[2] II R. 332.

[2] The United States notes in its brief, Brief for the Appellees 9 n. 4, that after the district court issued its Memorandum Opinion and Order in this case, the Supreme Court handed down an important decision on the Quiet Title Act, 28 U.S.C. § 2409a, in **Block v. North Dakota ex rel. Board of University of School Lands**, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983). In **Block** the Court ruled that Congress intended the Quiet Title Act to provide the exclusive means by which adverse claimants could challenge the United States' title to real property, and that the States must fully adhere to the twelve-year limitation period in § 2409a(f) when suing the United States. **Id.** at 282-90, 103 S.Ct. at 1817-22.

We agree that under **Block**, the present action must be characterized as one for quiet title, and not as one for declaratory judgment, as the trial court apparently thought. The statute of limitations provided by 28 U.S.C. § 2409a is not an issue on this appeal. The Government states in note 4 in its brief before us that the district court rested its finding of Quiet Title Act jurisdiction in part on the factual determination that the 12-year statute had not run; and because the court of appeals would only reverse such a finding if it were clearly erroneous, the Government has not challenged the ruling that the district court had Quiet Title Act jurisdiction to decide the case.

Turning to the merits, the district court found that the United States withdrew the bed of Utah Lake as part of the 1889 reservoir site selection, as revealed by language used in the correspondence and documents surrounding the 1889 withdrawal. The court further found that the withdrawal of Utah Lake was made after the United States acquired the territory, and before the State of Utah was created, for the appropriate public purpose of providing irrigation for future settlers of the arid west; thus, the United States' title in the area was not cut off by the subsequent creation of the State and the application of the equal-footing doctrine. Finally, the court rejected the State's contention that it obtained title to the bed of Utah Lake under the Submerged Lands Act, ruling that the bed of Utah Lake was excluded from the application of that Act by way of the exception provided in § 1311(a) for land retained by the United States before statehood. The court denied plaintiff's motion and granted defendants' motion for summary judgment.

On appeal, the issues presented are (1) whether the pre-statehood reservoir site withdrawal by the United States on Utah Lake prevented the State of Utah from acquiring title to the bed of Utah Lake as a matter of constitutional equal-footing, and (2) whether the Submerged Lands Act confirms any interest in the bed of Utah Lake in the State of Utah. Appellant's Brief 1-2.[3]

[3] The United States points out that a large part of Utah's brief discusses opinions and actions by State and Federal officials who may have thought or assumed that Utah owned the bed of Utah Lake, and states that if the State is implicitly arguing an estoppel theory, that theory should be rejected. Brief for the Appellees 37-40. However, the propositions as stated in the briefs filed for the State do not actu-

II

The equal-footing doctrine

In *Potter v. Murray City*, 760 F.2d 1065, 1067 (10th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 145, 88 L.Ed.2d 120 (1985), we stated:

> The equal footing doctrine embraces the precept that each state is equal in power, dignity, and authority, and that a state's sovereign power may not be constitutionally diminished by any conditions in the acts under which the State was admitted to the Union; any conditions imposed by Congress would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress. *Coyle v. Smith*, 221 U.S. 559, 567, 573, 574 [31 S.Ct. 688, 690, 692, 693, 55 L.Ed. 853] (1911).

In *Montana v. United States*, 450 U.S. 544, 551-52, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493 (1981), the Supreme Court summarized the basic principles of the equal-footing doctrine in issue here as follows:

> As a general principle, the Federal Government holds [lands under navigable waters] in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. *Pollard's Lessee v.*

[3] Continued
ally urge an estoppel theory and at argument counsel for the State said the State is not arguing an estoppel. Accordingly, we do not reach that issue.

Hagan, 3 How, 212, 222-223, 229 [11 L.Ed. 565]. After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce. *United States v. Oregon*, 295 U.S. 1, 14 [55 S.Ct. 610, 615, 79 L.Ed. 1267]. It is now established, however, that Congress may sometimes convey lands below the high-water mark of a navigable water,

> "[and so defeat the title of a new State,] in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Shively v. Bowlby*, 152 US. 1, 48 [14 S.Ct. 548, 566, 38 L.Ed. 331].

But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, *United States v. Oregon*, supra, [295 U.S.] at 14 [55 S.Ct. at 615] it will not not be held that the United States has conveyed such land except because of "some international duty or public exigency." *United States v. Holt State Bank*, 270 U.S., [49] at 55 [46 S.Ct. 197, 199, 70 L.Ed. 465]. See also *Shively v. Bowlby*, supra, [152 U.S.] at 48 [145 S.Ct. at 199]. A court deciding a question of title to the bed of a navigable water must, therefore,

begin with a strong presumption against conveyance by the United States, *United States v. Oregon*, supra, [295 U.S.] at 14 [55 S.Ct. at 615], and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," *United States v. Holt State Bank*, supra, [270 U.S.] at 55 [46 S.Ct. at 199], or was rendered "in clear and especial words," *Martin v. Waddell*, supra, [16 Pet. 367] at 411, [10 L.Ed. 997], or "unless the claim confirmed in terms embraces the land under the waters of the stream," *Packer v. Bird*, supra, [137 U.S. 661] at 672 [11 S.Ct. 210, 212, 34 L.Ed. 819].

Although the Court in *Montana* referred specifically to pre-statehood conveyances, the same principles also apply to pre-statehood reservations or withdrawals by the United States. *See United States v. City of Anchorage, State of Alaska*, 437 F.2d 1081, 1084-85 (9th Cir. 1971); *United States v. Alaska*, 423 F.2d 764, 766-68 (9th Cir.), *cert. denied*, 400 U.S. 967, 91 S.Ct. 363, 27 L.Ed. 2d 388 (1970).

Here there is no dispute that Utah Lake is a navigable body of water.[4] The question is whether the pre-

[4] The pretrial order reflects that the following statement of facts was agreed on by the parties (I R. 98):

> B. On January 4, 1896, (the date of Utah's statehood) Utah Lake was "navigable-in-fact" under federal law and was susceptible of being used, in its ordinary condition, as a highway of commerce over which trade and travel may have been conducted in the customary modes of trade and travel on water, all within the meaning of The Daniel Ball, 10 Wall. 557, 563 [19 L.Ed. 999] (1870), as interpreted and applied in United States v. Holt State Bank, 270 U.S. 49 [46 S.Ct. 197, 70 L.Ed. 465] (1926); United States v. Utah, 283 U.S. 64 [51 S.Ct. 438, 75 L.Ed. 844] (1931); and Utah v. United States, 406 U.S. 484 [92 S.Ct. 1691, 32 L.Ed.2d 246] (1972).

sumption under the equal-footing doctrine—that the beds of navigable waters remain in trust for future states and pass to the new states when they assume sovereignty—has been overcome by some "definitely declared" or "plain" intent to withdraw the bed of Utah Lake "because of 'some international duty or public exigency.' *Montana*, 450 U.S. at 552 [101 S.Ct. at 1251] (quoting *Holt State Bank*, 270 U.S. at 55 [46 S.Ct. at 199])." We now will examine the scope of the 1889 reservoir site selection, the statutory authorization for that selection, and the purposes for which the selection was made.

A

The 1889 reservoir site selection

The selection of Utah Lake as a reservoir site was made in 1889 by John Wesley Powell, then Director of the United States Geological Survey (U.S.G.S.), under the provisions of the Sundry Appropriations Act of 1888, 25 Stat. 505, 526-27.[5] In a report to the Secretary of the

[5] The Sundry Appropriations Act provided in part as follows:

> FOR GENERAL EXPENSES OF THE GEOLOGICAL SURVEY: . . .
>
> For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid regions, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, and to make the necessary maps, including the pay of employees in field and in office, the cost of all instruments, apparatus, and materials, and all other necessary expenses connected therewith, the work to be performed by the Geological Survey, under the direction of the Secretary of the Interior, the sum of one hundred thousand dollars or so much thereof as may be necessary. And the Director of the Geological Survey under the supervision of the Secretary of the Interior shall

Interior, dated April 6, 1889, Director Powell wrote:

> I have the honor to report that *the site of Utah Lake* in Utah County in the Territory of Utah is hereby selected as a reservoir site, *together with all lands situated within two statute miles of the border of said lake at high water*.
>
> Pending the more accurate designation of the boundaries of the foregoing site by township, section and quarter-section lines, I respectfully recommend that the Register of the Land Office at Salt Lake City be instructed to refuse further entries of public land within the foregoing prescribed limits.
>
> I venture to add that speedy action should be taken in this matter as any further entries of the lands adjoining Utah Lake will have a tendency to defeat the purposes of the law and obstruct the use of the lake as a natural reservoir for the irrigation of lands below its outlet.

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[5] **Continued**

> make a report to Congress on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoires [sic] and an itemized account of the expenditures under this appropriation. And all the lands which may hereafter be designated or selected by such United States for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law.

25 Stat. 505, 526-27.

I R. 142-43 (reprinting letter from Director of the Geological Survey to the Secretary of the Interior) (emphasis added).

Utah asserts that the 1889 reservoir site selection did not include the bed of Utah Lake because Director Powell's report does not specifically or unambiguously refer to the bed of Utah Lake or its minerals. Appellant's Brief 24-25. However, when the report is read together with other agency documents surrounding the withdrawal, we feel that the intentions of the U.S.G.S. are made sufficiently clear. For example, when informing Congress of the reservoir site selection in its Tenth Annual Report, the U.S.G.S. included the following description of the hydrographic work in Utah:

> In April Mr. Newell was sent to Utah to make certain examinations of Utah Lake with reference to its capacity for a reservoir site and to furnish the specifications for its withdrawal as such under the law, so far as *the lands covered* or overflowed *by it* or the lands bordering upon it *were still public lands*.

I R. 151 (reprinting *Tenth Annual Report, supra,* at 88). (emphasis added).

Even more telling is the agency's express reference to the bed of Utah Lake in its Eleventh Annual Report:

> In Utah, in addition to the general reconnaissance of the storage facilities at the headwaters of the Sevier River and other streams, a careful survey was made of Utah Lake. This survey, run by level and transit

around the lake, was for the purpose of determining the area which would be covered by damming or holding back the flood water. A description of the location and physical features of this body of water is to be found in this report under the head of Hydrography, and it will suffice to state here that after a careful study it was found that, on account of the excessive evaporation from such an enormous surface, the lake was too large to act in an economical manner as a storage reservoir. On the other hand, while it may not be advisable to hold back the water to a point above that of the average height, yet there is sufficient evidence to show that natural forces at times may raise the water level and increase the area to abnormal proportions by backing water over the great fringing marshes on the east and south. This land being, therefore, the natural flood ground of the lake should be reserved up to the high-water line. *Accordingly, the segregation, as shown on Pl. XCV and given in the following lists, was made to include not only the bed but the lowlands up to mean high water.*

I R. 153-54 (reprinting Eleventh Annual Report of the United States Geological Survey to the Secretary of the Interior 1889-90, Part II Irrigation 183-84) (emphasis added).

Finally, the agency stated in its Twelfth Annual Report:

> [T]he lake is in effect too large to be most effective as a storage reservoir. . . .

> [T]he efficiency of the lake as a reservoir would be greatly increased if its area could be reduced even to less than half of its present extent. . . .
>
> Thus, while to obtain the maximum amount of water in years of scarcity it would be better if the lake were small, yet to take care of the floods, which will happen at intervals of from five to ten years, it is necessary that the lake have a flood area as large as it now has, or even what it would have at the highest water. From consideration of these points *the segregation of the land around and under the lake was made* to a contour line which should be 5 feet above the low-water mark of 1879.

Twelfth Annual Report of the United States Geological Survey to the Secretary of the Interior 1890-91, Part II —Irrigation 339 (emphasis added) (citation omitted).

The language of these documents reveals that the United States intended to and did in fact select the entire lakebed as part of the 1889 reservoir site selection. These documents comprise the involved agency's contemporaneous interpretation and understanding of the scope of the selection which were not unreasonable and as such are entitled to deference. *See Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631, 90 S.Ct. 1328, 1334, 25 L.Ed.2d 615 (1970); *Udall v. Tallman,* 380 U.S. 1, 16-18, 85 S.Ct. 792, 801-02, 13 L.Ed.2d 616 (1965).

B

Congressional Authorization

1. *The Sundry Appropriations Act of 1888*

Utah argues that even if the 1889 reservoir site se-

lection included the bed of Utah Lake, that selection was not valid because Congress did not authorize withdrawal of the lakebed under the Sundry Appropriations Act of 1888. Appellant's Brief 25; Appellant's Reply Brief 6. Specifically, Utah argues that the 1888 Act merely provided that, once selected, reservoir sites located in the public domain were withdrawn from sale and were not thereafter open to entry, settlement, or occupation until further provided by law. The State asserts that beds of navigable waters were not legally or physically subject to any type of private entry or sale as property of the United States, and therefore were not covered by the Act's withdrawal provisions. Appellant's Brief 22-23; Appellant's Reply Brief 6.

The 1888 Act provides:

> [A]ll the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law. . . .

25 Stat. 505, 526-27.

The State would have us read the Act's proscription on "entry, settlement or occupation" of lands selected under the Act as excluding the beds of navigable waters. However, by its terms the statute provides broadly that

"all the lands which may hereafter be designated or selected . . . for sites for reservoirs . . . for irrigation purposes" were to be thenceforth "reserved from sale as the property of the United States," as well as not being "subject . . . to entry, settlement or occupation." *Id.* The statute thus imposes no restriction on the U.S.G.S's selection authority on the type of lands that could be designated or selected. We find no merit in the contention that the terms of the Act excluded the beds of navigable waters from lands that could be selected under the Act.

2. *Subsequent Congressional Action*

Utah points out that after the 1885 Act was passed, the U.S.G.S. proceeded to withdraw vast tracts of land as potentially irrigable or for reservoir sites, causing a furious outcry in the West, including charges that the U.S.G.S. was attempting to prevent further settlement. Utah states that discontent with existing large reservoir site withdrawals led to the enactment of various amendments to the 1888 Act which, it says, had the effect of restricting the 1889 withdrawal on Utah Lake. Utah asserts that the trial court in its opinion failed to address or take into account the effect of these amendments on the original 1889 withdrawal of Utah Lake. Appellant's Brief 24.

Congress amended the 1888 Act several times—in 1890, in 1891, and in 1897.[6] However, on none of these

[6] More recently, the 1888 Act was amended by § 704(a) of the Federal Land Policy Management Act of 1976, 43 U.S.C. § 662, to provide that:

> Sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the

occasions did Congress modify or rescind the withdrawal of Utah Lake including its bed. In the Act of August 30, 1890, 26 Stat. 371, 391, Congress repealed the 1888 provision "*except* that *reservoir sites heretofore located or selected* shall remain segregated and reserved from entry or settlement as provided by said Act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof." (Emphasis added). In the Act of March 3, 1891, 26 Stat. 1095, 1101-02, Congress restricted the location and selection of reservoir sites to "only so much land as is actually necessary for the construction and *maintenance* of reservoirs . . . . ," and also provided for rights-of-way through public lands and reservations of the United States to canal or ditch companies formed for the purpose of irrigation provided "[t]hat no such right of way shall be located as to interfere with the proper occupation by the Government of any such reservation . . . ." Finally, in the Act of February 26, 1897, 29 Stat. 599, Congress provided that:

> [A]ll reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way Act

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[6] **Continued**

> prevention of floods and overflows, located or selected prior to August 30, 1890, shall remain segregated and reserved from entry, or settlement, until otherwise provided by law, and reservoir sites thereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

43 U.S.C. § 662. Thus, the recent amendment does not affect the validity of the Utah Lake reservoir site selection, and no argument to that effect is made by the State of Utah.

> of March Third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* that the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.

See generally California v. United States, 438 U.S. 645, 659-63, 98 S.Ct. 2985, 2993-95, 57 L.Ed.2d 1018 (discussing 1888 Act and amendments as background to Reclamation Act of 1902).

We are not persuaded that any of the legislation relied on by the State modified or overrode the effect of the Utah Lake reservoir site selection.

3. *Legislative History of the Amendments*

Utah's brief reviews in considerable detail selected portions of the legislative history of the amendments and asserts that this history is relevant to ascertain not only the intent of Congress regarding those amendments, but also that concerning the 1888 Act itself, citing *Andrus v. Shell Oil Co.,* 446 U.S. 657, 668-671, 100 S.Ct. 1932, 1939-41, 64 L.Ed.2d 593 (1980), and *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 380-81, 89 S.Ct. 1794, 1801-02, 23 L.Ed.2d 371 (1969), *inter alia.*

Relying on statements made during the floor debates of the 1890 amendment, Utah argues that the 1888 Act was passed for a very limited purpose—to control the rampant speculation and monopoly then going on in the West—and that Congress intended only *temporarily* to withdraw such lands until it could act to ensure that those making entry under public land laws for reservoir sites and irrigation purposes would occupy and develop the land in a fair and orderly fashion; and by their nature, beds of navigable waters simply could not have been a part of the problem Congress wanted to remedy. Appellant's Brief 26-30 (quoting statements of Sen. Reagan and Rep. Cogswell, 21 Cong.Rec. 7359, 7399, 7771 (1890)); Appellant's Reply Brief 7.

Utah also maintains that in authorizing the withdrawal of reservoirs sites, Congress intended that such reservoir sites located around natural navigable lakes withdraw only the adjacent uplands that might be inundated, not the bed of the natural water course. It says that the primary concern here was that if settlers entered and claimed lands in close proximity to a natural lake, they would have to be compensated if the reservoir later inundated their land. Therefore, Utah argues, it would be illogical to assume that Congress could have intended to withdraw the beds of lakes which were already covered by water. *Id.* at 32-34 (quoting statements of Sen. Jones, 21 Cong.Rec. 7386, 8327 (1890)).

We are not persuaded by either of these arguments. First, the plain language of the statute refutes the state's claim that the legislative history of the amendments demonstrates that reservoir site withdrawals were only "temporary," not permanent. In the 1888 Act, the reservoir sites were reserved by the United States "until further provided by law," 25 Stat. 505, 526-27, and thus the statute itself provided for the possibility of non-temporary withdrawals.

Second, the State's argument that Congress intended only that the adjacent uplands surrounding natural navigable lakes be withdrawn as reservoirs, assumes that Congress was concerned in every instance with those uplands that might be inundated if and when the water level was raised. We feel that assumption is unwarranted. The 1888 Act places no such limitation on the U.S.G.S.'s withdrawal authority, and, as noted earlier, the agency's contemporaneous understanding of the statute was that it authorized the selection of Utah Lake, including its bed. Moreover, although officials of the U.S.G.S. initially thought that the water level of Utah Lake should be raised, subsequent studies indicated that the water level should be lowered below the natural shoreline. In testimony before the Select Committee on Irrigation and Reclamation of Arid Lands, F. H. Newell of the U.S.G.S. stated:

> I came here in March, and began first a survey of Utah Lake. I made a careful survey of the shore lines and the amount of land that would be overflowed by raising the lake according to the wishes of the people.
>
> . . . .
>
> . . . At first it was thought necessary to raise the lake in order to get more water, but on more careful

study I think the lake can perform its full functions best by drawing down below the natural shore lines, rather than by raising it above them. In other words, if raised above, the lake will be too large for the evaporation area. The evaporation is even now too great in proportion to the amount of water than can be taken out. My estimates show that the evaporation this spring has been twice as much as the water coming from the Jordan [River]. If this lake is raised that proportion must increase; while if it is lowered, and the outlets consequently are lowered, the proportion lost by evaporation will be less compared with that which can be utilized.

Reports of Committees of the Senate of the United States for the First Session of the Fifty-First Congress 1889-90, Vol. 5-No. 928, Irrigation—pt. 3, at 55, 61 (1890); *see also Twelfth Annual Report, supra*, at 339 ("[T]he efficiency of the lake as a reservoir would be greatly increased if its area could be reduced even to less than half of its present extent. . . .").

Beyond this, a basic difficulty with Utah's line of argument is that it is based almost entirely on the views of individual Congressmen who were part of a different Congress from that which passed the original Sundry Appropriations Act. The Supreme Court has admonished that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one". *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960). Here the language of the 1888 Act, and the contemporaneous understanding of the Act by the agency involved in its administration support the validity of the U.S.G.S.'s authority to include the bed of Utah Lake in its 1889 selection.

4. *The Mineral Estate*

Utah asserts that in any event the 1888 Act authorized withdrawal of the surface estate only, and not the mineral estate, and that if the mineral estate had not been reserved or withdrawn, it would have passed to Utah at statehood. We find no merit in this argument. The 1888 Act does not distinguish between surface and sub-surface estates in authorizing withdrawals of reservoir sites, nor is any such distinction made in the selection order and the documents surrounding the selection. We hold, therefore, that the 1888 Act and the reservation made pursuant to it covered the lakebed, and underlying minerals, not just the surface of the bed, among the lands withdrawn in connection with Utah Lake.

C. *Selection Purposes*

Apart from questions of congressional intent, Utah argues that it must not be deprived of title to the bed of Utah Lake except upon a strict and narrow concept of "public exigency," citing *Montana*, 450 U.S. at 552, 556, 101 S.Ct. at 1251, 1253 (1981). Utah says that a public exigency requires a public necessity and not simply an "appropriate public purpose" as the district court apparently thought. Its brief argues that under no reasonable view of the facts and legislative history can it be said that Congress imagined some public exigency would go unresolved if the bed of Utah lake were not withdrawn. Appellant's Reply Brief 13-14. In *Montana*, the Court did stress the general principle of holding land in trust for

future States and that control over property underlying navigable waters is strongly identified with the sovereign power of government. *Montana*, 450 U.S. at 551-52, 101 S.Ct. at 1251-52. However, the Court also stated:

> It is now established, however, that Congress may sometimes convey lands below the highwater mark of a navigable water,
>
> > "[and so defeat the title of a new State,] in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, *or to carry out other public purposes appropriate to the objects for which the United States hold the Territory.*" *Shively v. Bowlby*, 152 U.S. 1, 48 [14 S.Ct. 548, 566].

Id. at 551, 101 S.Ct. at 1251 (emphasis added) (brackets in opinion of Supreme Court). The Court went on to emphasize that "because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, . . . it will not be held that the United States has conveyed such land except because of 'some international duty or *public exigency.*'" *Id.* at 552, 101 S.Ct. at 1251 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926) (emphasis added).[7]

[7] Later in the opinion, in discussing whether title to the bed of the Big Horn River passed to the State of Montana upon its admission to the Union, the Court elaborated upon the public exigency test as follows:

> [E]ven though the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of **Shively v. Bowlby**, 152 U.S., at 48 [14 S.Ct. at 566] justifying a congressional conveyance of a riverbed, **see, e.g., Alaska Pacific Fisheries v. United States**, 248 U.S. 78, 85 [39 S.Ct. 40, 63 L.Ed. 138] the situation of the Crow Indians at the time of the treaties [of 1851 and 1868] presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future states. **See Shively v. Bowlby, supra**, [152 U.S.] at 48 [14 S.Ct. at 566]. As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life.

Montana, 450 U.S. at 556, 101 S.Ct. at 1253.

In the instant case, the district court held that "[t]he withdrawal of Utah Lake was made 'after acquiring the territory and before the creation of the state' for the carrying out of 'public purposes appropriate to the objects for which the territory was held.' Those purposes include irrigation for the benefit of future settlers of the arid West." II R. 336 (quoting *Holt State Bank*, 270 U.S. at 54-55, 46 S.Ct. at 198-99.) Although the court did not characterize its holding explicitly in terms of a "public exigency," we are satisfied that the withdrawal of Utah lake, including its bed, was made for a public purpose motivated by a public exigency, given Congress' stated concerns that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled. *See* 25 Stat. 509, 526-27. That the United States may now be using the site for the additional purpose of developing minerals under the lake does not defeat the validity of the reservation of the lakebed based on the public exigency existing at the time the site selection was made.

In sum, we conclude that the title to the bed of

Utah Lake did not pass to the State of Utah upon its admission to the Union under the equal-footing doctrine.

III

The Submerged Lands Act

The State further argues that the 1889 withdrawal, even if valid initially, no longer has any force or effect because it was superseded in 1953 by the Submerged Lands Act, 43 U.S.C. §§ 1301-1343, which, it says, disclaimed to the states any federal interest in any beds of inland navigable waters, unless the United States was actually in possession of such lands under some claim of right. Appellant's Brief 69. Utah asserts that it obtained title to the bed of Utah Lake under the Act because the United States was not in actual possession of the lakebed in 1953 or, for that matter, at any time since Utah's statehood. *Id.*

We must disagree. Sections 1311(a) and (b)(1) of the Submerged Lands Act provide:

> (a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective states, and the natural resources within such lands and waters . . . be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective states . . .;
>
> (b)(1) The United States releases and relinquishes unto said states and persons aforesaid, *except as otherwise reserved herein,* all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources. . . .

43 U.S.C. §§ 1311(a), (b)(1) (emphasis added). Section 1313(a), in turn, excepts from the operation of § 1311, *inter alia,* "all lands expressly retained . . . by the United States when the state entered the Union (otherwise than by a general retention . . . of lands underlying the marginal sea)."

As discussed in Part II, *supra,* the United States expressly reserved the bed of Utah Lake for federal reservoir purposes in 1889, seven years before Utah became a state. Thus, this case falls squarely within the language of § 1313(a), and the 1889 withdrawal remains valid. *See United States v. Alaska,* 423 F.2d at 768.

Utah argues, however, that the legislative history of the Submerged Lands Act shows that Congress intended to include Utah Lake as part of the inland navigable waters vested and confirmed in state ownership by the Act. Utah relies on Appendix F of the Senate Report, which shows the total acres of inland waters in the State of Utah. Utah then refers to the source of that appendix, a Census Bureau report, to determine the number of acres of inland navigable waters in Utah County. Finally, it uses a series of tables and maps in the Census publication to conclude that Utah Lake must have been included among the waters totalled for the State. Appellant's Brief 70-73.

Utah's reliance on the legislative history of the Act is misplaced. Appendix F of the Senate Report, entitled

"Approximate areas of submerged lands within state boundaries," *see* III R. 93, simply describes the inland waters that are subject to the Submerged Lands Act and does not reflect any reduction to account for the exceptions contained in § 1313. Furthermore, the Census report on which that appendix was based, *Areas of the United States, 1940, 16th Census of the United States,* was, as its title indicates, taken from a 1940 census and was not tailored to the exceptions provided in the Submerged Lands Act of 1953.

Utah also argues that it never expressly agreed to federal ownership of the bed of Utah Lake at the time of statehood, and that such agreement is essential to trigger the exception in § 1313, citing statements in the legislative hearings. This argument, however, would have us ignore the explicit language in the statutory exception, which speaks only of lands "expressly retained . . . by the United States when the states entered the Union . . . ," 43 U.S.C. § 1313(a), and says nothing of state concurrence. Thus, the absence of agreement is irrelevant to the question whether title to the bed of Utah Lake vested in the State under the Submerged Lands Act.

We conclude that the title of the United States to the bed of Utah Lake was not altered by the passage of the Submerged Lands Act. The United States expressly withdrew the lakebed prior to statehood and under 1313(a) Congress specifically excepted such lands from the operation of the Act.

IV

Conclusion

Accordingly, the district court's summary judgment quieting title to the bed of Utah Lake in the United States is

AFFIRMED.

APPENDIX B

The STATE OF UTAH, By and Through its DIVISION OF STATE LANDS, Plaintiff,

vs.

UNITED STATES OF AMERICA; JAMES G. WATT,* Secretary of the United States Department of the Interior; FRANK GREGG, Director of the Bureau of Land Management within the Department of the Interior; and PAUL L. HOWARD, Utah State Director of the Bureau of Land Management, Defendants.

Civ. No. C 79-0302J.

United States District Court, D. Utah, C.D.

April 15, 1985.

Dallin W. Jensen and Michael M. Quealy, Salt Lake City, Utah, for plaintiff.

Joseph W. Anderson, Asst. U.S. Atty., Salt Lake City, Utah, Steven A. Herman and Lawrence Puckett, Dept. of Justice, Land & Natural Resources Div., Washington, D.C., for defendants.

MEMORANDUM OPINION AND ORDER

JENKINS, Chief Judge.

Plaintiff, the State of Utah, brought this action to enjoin the defendants, the United States of America and officers of the Department of Interior, from interfering

* Successor to Cecil D. Andrus.

with Utah's ownership and management of the bed of Utah Lake, located in Utah County, Utah. Each of the parties claims to be the owner of the lakebed. Each has filed a motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, seeking a holding in its behalf. The essential facts are not in dispute. The Court heard arguments on the motions June 10, 1982. Joe Anderson, Esq. and Steven A. Herman, Esq. represented the United States. Richard L. Dewsnup,** Esq., Dallin W. Jensen, Esq. and Michael M. Quealy, Esq. appeared on behalf of the State of Utah. After careful consideration of the motions, the arguments made and briefs submitted, this Court issues the following Memorandum Opinion and Order.

The parties are in dispute regarding the procedure by which the case comes before this Court. The United States maintains that the action is one to determine which party has the superior claim to title to the bed of Utah Lake. According to the United States, the action is governed by the Quiet Title Act, which provides, in part:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest other than a security interest or water rights.

28 U.S.C.A. § 2409a(a) (1978). Although Utah relies on the Quiet Title Act as an alternative basis for juris-

** During the pendency of this decision, Richard L. Dewsnup, Solicitor General of the State of Utah, passed away. The Court would like to acknowledge the loss of Mr. Dewsnup, a skilled and memorable advocate.

diction, it asserts that the action is primarily for declaratory relief under the Federal Declaratory Judgment Act, 28 U.S.C.A. § 2201 (1982), and that this Court has federal question jurisdiction over the action. 28 U.S.C. § 1331 (1966). Utah maintains that it seeks only "a legal interpretation of the scope and effect of the 1889 Withdrawal Order on Utah Lake"[1] and that it does not seek "to resolve any of the claims of the private land owners surrounding Utah Lake."[2]

I. DECLARATORY JUDGMENT

Utah asserts that the current action is one for declaratory judgment. Under that concept, the United States argues an action will not lie against it because it has not consented to be sued — it has not waived its "sovereign immunity". The Declaratory Judgment Act alone cannot overcome the jurisdictional bar of sovereign immunity. *E.g., Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671, 70 S.Ct. 876, 878, 94 L.Ed. 1194 (1950); *Bussey v. Harris*, 611 F.2d 1001, 1005 n.7 (5th Cir. 1980); *Fidelity & Casualty Co. v. Reserve Ins. Co.*, 596 F.2d 914, 916 (9th Cir. 1979); *Cook v. Arentzen*, 582 F.2d 870, 875 (4th Cir. 1978). Utah does not stop with the Declaratory Judgment Act. In addition, it relies on the Administrative Procedure Act, (APA), as the statute which provides the necessary consent and under which the United States is subject to suit.[3] Section 702 of the APA provides, in part, that:

[1] Memorandum in Support of Utah's Cross-Motion for Summary Judgment, 104.

[2] Id.

[3] Complaint at 3.

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. . .

5 U.S.C.A. § 702 (1977). There is some conflict over the scope of the waiver contained in § 702. In *Watson v. Blumenthal*, 586 F.2d 925, 932 (2d Cir. 1978), the Court of Appeals for the Second Circuit held that § 702 "did not remove the defense of sovereign immunity in actions under § 1331 [federal question jurisdiction]." The *Watson* court found that § 702 does not waive immunity in "nonstatutory" review of agency action. An action under § 1331 is "nonstatutory" in the sense that it is not brought under a statute that specifically provides for agency review.

The Court of Appeals for Third Circuit rejected the *Watson* analysis holding that § 702 waives sovereign immunity in "nonstatutory", as well as statutory review of agency action. *Jaffee v. United States*, 592 F.2d 712, 718-19 (3d Cir. 1979). The Court of Appeals for the Tenth Circuit cited the *Jaffee* opinion favorably in *Carpet & Linoleum & Resilent Tile, Etc. v. Brown*, 656 F.2d 564, 567 (10th Cir. 1981). In *Carpet & Linoleum*, the Court of Appeals for this circuit held that § 702 waived sovereign immunity in a mandamus action grounded in federal question jurisdiction. Similarly, in the case at

bar, Utah argues that § 702 waives immunity for a declaratory judgment action in which subject matter jurisdiction also is based on a federal question. Therefore, we find that a declaratory judgment action will lie against the United States in the present dispute.

II. QUIET TITLE

Defendant, the United States, argues that the action is one under the Quiet Title Act, 28 U.S.C.A. § 2409a(a) (1978). Defendant claims that although the Act waives sovereign immunity, actions under it must be brought within the specified limitations period. Section 2409a(f) of the Quiet Title Act provides:

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

28 U.S.C.A. § 2409a(f) (1978). Defendant maintains that state authorities were aware of the United States "claim" to the bed of Utah Lake in 1963, more than twelve years before the action was brought[4] and thus the action is barred. In that year a series of letters were written to the Governor of Utah discussing the possibility of a federal claim to the lake bed. On February 21, 1963, the United States Secretary of Interior, Stewart Udall, wrote a letter to Governor George Clyde in which he stated that the bed of Utah Lake was segregated as a reservoir site in 1889 and that "it would appear that lands beneath navigable waters reserved by the United States

[4] This action was filed May 22, 1979.

prior to statehood, for public uses or purposes, would not pass to the state.[5]" The State of Utah argues, however, that Secretary Udall's August 15, 1963 letter is more reflective of the federal position. In that letter the Secretary of Interior stated, "We are not prepared to state with finality whether title to the bed of Utah Lake has or has not passed to the State of Utah.[6] The next correspondence on which the United States bases its argument that Utah "should have known" of the federal "claim" to the lake bed is a letter of the local Regional Solicitor written in January, 1965. Stuart McMaster, Regional Solicitor of the Bureau of Reclamation, wrote an opinion addressed to the Regional Director in which he stated:

> It is our opinion that the designation and reservation of Utah Lake as a reservoir site on April 11, 1889, pursuant to the Act of October 2, 1888, and prior to statehood in 1896, precluded the state's sovereign rights from attaching to lands underlying such navigable waters.[7]

The United States contends that the McMaster report put the state on notice that the federal government claimed an interest in the bed of Utah Lake. Utah, however, emphasizes that the report was sent to the Regional Director of the Bureau of Reclamation rather than to the

[5] Letter from Secretary of Interior to Governor of Utah (February 21, 1963) (discussing Central Utah Project).

[6] Letter from Secretary of Interior to Governor of Utah (August 15, 1963) (discussing 1889 withdrawal).

[7] Letter from Regional Solicitor, Stuart McMaster, to Regional Director, Bureau of Reclamation, Salt Lake City, Utah (January 26, 1965) (discussing reservation and withdrawal of Utah Lake as a permanent reservoir site under the Act of October 2, 1888) at 5-6.

Utah Governor.[8] Further, McMaster recommended that "when you have determined the area actually needed for the Central Utah Project, you should eliminate from the reservation and restore any excess lands now withdrawn and reserved, *and notify the state of the position taken by the United States.*[9]" Although the Governor's office was in possession of a copy of the McMaster report, there is no indication that notice was given of "the position taken by the United States." Nor is there evidence that the United States publically took the position suggested by McMaster, at that time.

The Court of Appeals for the Tenth Circuit recently interpreted the limitations section of the Quiet Title Act, stating:

> The operative words of the statute — "should have known" import a test of reasonableness. Only if it was unreasonable for the [plaintiff] to have failed to discover the *claim* of the United States should the limitations provision of § 2409a(f) become operative.

Amoco Production Co. v. United States, 619 F.2d 1383, 1388 (10th Cir. 1980) (emphasis added). Under the facts of the present dispute, the last correspondence from the Secretary of Interior to the Governor of Utah stated that the United States was unwilling to say that it owned the lake bed. The United States had then not yet stated a claim. The McMaster report was an inter-agency memorandum suggesting the grounds by which the United

[8] Governor George Clyde was succeeded by Governor Calvin Rampton in 1965.

[9] Id. at 7 (emphasis added).

States could claim an interest in the bed of the lake. There is no indication that the Secretary of Interior changed his position in reliance on the report. Further, there is no evidence that defendants followed McMaster's advice and notified "the state of the position taken by the United States." This circuit has held that for the statute of limitations under the Quiet Title Act to run "[a]ll that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." *Knapp v. United States,* 636 F.2d 279, 283 (10th Cir. 1980). Secretary Udall's August 15, 1963 letter indicates that the United States was uncertain whether it claimed an interest adverse to that of the state. The McMaster report analyzes a method by which the United States could claim an interest adverse to the state's if it so desired. There is no indication that it did so in 1965. Further, in *Knapp,* the Court of Appeals discounted the reliability of opinions given by individual officials as follows:

> But whatever the intent or opinions of individual government officials, only Congress had the power to release the Government's apparent interest, and plaintiff's were told this in 1958.

636 F.2d at 283 n.2. Likewise, the State of Utah cannot be expected to rely on a report by the local Regional Solicitor of the Bureau of Reclamation to the Regional Director of that department as the official statement of United States policy. This is particularly true when the United States Secretary of Interior had last informed the Utah Governor that the United States was not ready to take a position on the issue. This Court holds that the

action is timely[10] under the Quiet Title Act, 28 U.S.C.A. § 2409a *et seq.*[11]

Plaintiffs insist that this suit is one for declaratory judgment while defendants maintain that it is a Quiet Title action. Because either theory gives this Court the opportunity to examine the merits of the case, it is unnecessary to resolve that dispute.

III. THE LAKE BED

A. 1889 Withdrawal

Congress authorized the withdrawal of lands in the arid West for reservoir sites in the Sundry Appropriations Act of 1888, which provides:

> — [There is appropriated] for the purpose of investigation, the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows . . . the sum of $100,000 . . . . And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs,

[10] The McMaster report was written in 1965. This action was commenced 14 years later in 1979. There is nothing to suggest that plaintiff "should have been aware" of the United States "claim" between 1965 and 1967.

[11] Plaintiff argues that the limitations provision of the Quiet Title Act, 28 U.S.C.A. § 2409a(f) (1978), does not run against the states. A petition for certiorari has been filed with the United States Supreme Court to consider that issue. **Block v. North Dakota**, 671 F.2d 271 (2d Cir. 1981), (petition filed June 1982). We need not reach that question here, however, because we find that plaintiff's action is timely.

> ditches, or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches, or canals are from this time henceforth, hereby reserved from sale as property of the United States, and shall not be subject after the passage of this act, to entry, settlement, or occupation until further provided by law: *Provided*, That the President may at any time in his discretion by proclamation open any portion or all of the lands reserved by this provision to settlement under the homestead laws.

Act of October 2, 1888 (25 stat. 526). Pursuant to that Act, on April 6, 1889, John Wesley Powell, the Director of the United States Geological Survey (USGS) selected Utah Lake as a reservoir site. In a letter to the Secretary of Interior, Powell stated: "I have the honor to report that *the site of Utah Lake* in Utah County in the Territory of Utah is hereby selected as a reservoir site, *together with all lands situate*[*d*] *two statute miles of the border of said lake at high water.*"[12] As a result of that withdrawal, the USGS made a survey to more accurately describe the reserved area by legal subdivisions. In its annual update to the Secretary of Interior in 1889, the USGS included a report of Captain C. E. Dutton, which stated:

> In April Mr. Newell was sent to Utah to make certain examinations of Utah Lake with reference to its capacity for a reservoir site and to furnish the specifications for its withdrawal as such under the law, so far as *the lands covered* or overflowed

[12] Letter from Director of United States Geological Survey to U.S. Secretary of Interior (1889) (discussing Utah Lake withdrawal) (emphasis added).

by it or the lands bordering upon it *were still public lands.*[13]

In its next report, the USGS discussed the results of its study of the area reserved by the Utah Lake withdrawal. The report stated that the USGS survey "was made to include not only the bed [of Utah Lake] but the lowlands up to mean high water", as well.[14] The language used in the correspondence and documents surrounding the 1889 withdrawal expressly include the bed of Utah Lake. Because these documents reflect the involved agency's contemporaneous interpretation of the scope of the withdrawal, they are entitled to deference, *e.g., Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631, 90 S.Ct. 1328, 1334, 25 L.Ed.2d 615 (1969); *Udall v. Tallman,* 380 U.S. 1, 4-6, 85 S.Ct. 792, 795-6, 13 L.Ed.2d 616 (1965), and this Court now finds that the United States withdrew the bed of Utah Lake as part of the 1889 reservoir site selection.

B. Equal Footing

The state contends that even if the 1889 withdrawal included the lake bed, title passed to Utah at the time of statehood[15] under the Doctrine of Equal Footing. That doctrine provides that, like the original states which retained title to the beds of their navigable waters, all new states are entitled to the beds of navigable waters within their boundaries. *See, Montana v. United States,* 450 U.S. 544, 551, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493

[13] Tenth Annual Report of the United States Geological Survey to the Secretary of Interior 1888-89, Part II, at 63 (emphasis added).

[14] Eleventh Annual Report of the United States Geological Survey to the Secretary of Interior 1889-90, Part II, at 2.

[15] Utah became a state on January 4, 1896.

(1981). In that way the new states are said to be on "equal footing" with the original states. The Equal Footing Doctrine, however, is not without exception. The United States Supreme Court examined those exceptions in *United States v. Holt Bank,* 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926), stating:

> It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, *and subject to the qualification that where the United States after acquiring the territory and before the creation of the state,* has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for purposes of commerce among the states and with foreign nations, *or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state,* but remain unimpaired, and the rights which otherwise would pass to the state are restricted or qualified accordingly.

Id. at 54-55, 46 S.Ct. at 198-99 (emphasis added) (citations omitted). *See also, Montana v. United States,* 450 U.S. 544, 551, 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493 (1981); *United States v. Anchorage, Alaska,* 437 F.2d 1081, 1085 (1971); *United States v. Alaska,* 423 F.2d 764, 768 (9th Cir.), *cert. denied,* 400 U.S. 967, 91 S.Ct. 363, 27 L.Ed.2d 388 (1970). The withdrawal of Utah Lake was made "after acquiring the territory and before the creation of the state" for the carrying out of "public purposes appropriate to the objects for which the territory

was held." Those purposes include irrigation for the benefit of future settlers of the arid West. Under these circumstances, the United States' title in the area was "not cut off by the subsequent creation of the state." Utah's arguments to the contrary are not persuasive.

C. Submerged Lands Act

The state further asserts that it obtained title to the bed of Utah Lake through the Submerged Lands Act, 43 U.S.C.A. §§ 1301 *et seq.* (1964). In that Act, Congress relinquished the title and claims of the United States to land beneath the navigable waters within the boundaries of the states[16] and declared title and ownership of the land in the respective states.[17] Like the Doctrine of Equal Footing, the Submerged Lands Act is limited in its application. Section 1313 provides that:

> There is excepted from the operation of section 1311 of this title —
>
> (a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); . . . .

43 U.S.C.A. § 1313(a) (1964). Title to the bed of Utah Lake was expressly reserved by the United States in

[16] 43 U.S.C.A. § 1311(b)(1) (1964).
[17] Id. at § 1311(a)(1).

1889,[18] seven years before Utah became a state. The Court of Appeals for the Ninth Circuit discussed the application of the Submerged Lands Act to a similar situation in *United States v. Alaska,* 423 F.2d 764 (9th Cir.), *cert. denied,* 400 U.S. 967, 91 S.Ct. 363, 27 L.Ed.2d 388 (1970). In the *Alaska* case, the Court of Appeals held that the Act had no effect on a reservation by the United States made prior to statehood. *Id.* at 768. The Ninth Circuit based its holding on the language of the Act which specifically excluded "all lands expressly retained by or ceded to the United States when the state entered the Union. . . ." The present litigation also involves land retained by the United States before statehood. Therefore, the bed of Utah Lake is excluded from the application of the Submerged Lands Act, by § 1311(a), and title to it remains in the United States. Only Congress can relinquish the federal claim to the lake bed.

These determinations are as much a recital of history as they are legal determinations. The historic documents speak of what took place. This Court cannot simply overlook what they say. Congress, and Congress alone, may deal with the transfer of lands which have been reserved. It is to that forum the state may look if longed-for ownership is considered essential.

Based on the foregoing, plaintiff's motion for Summary Judgment is DENIED and defendant's motion for Summary Judgment is GRANTED.

[18] See supra, Part IIA.

APPENDIX C

The 1890 act, 26 Stat. 391, provides in relevant part:

> For topographic surveys in various portions of the United States, three hundred and twenty-five thousand dollars, one-half of which sum shall be expended west of the one hundredth meridian; and so much of the act of October second, eighteen hundred and eight-eight, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

The 1891 act, 26 Stat. 1101, provides in relevant part:

> SEC. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually

> necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs and that the provision of "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not to include lands entered or sought to be entered under mineral land laws.

The act of February 26, 1897, 29 Stat. 599, provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way Act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same ex nt as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.